90-732 (3)

Supreme Court, U.S.
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NO.: ~~90-401~~

THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

In the Matter of Louis Kerlinsky
Petitioner

On Petition for a Writ of Certiorari to the
Supreme Judicial Court of the
Commonwealth of Massachusetts

Petitioner's Reply Brief

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The Board of Bar Overseers in effect filed a motion to amend the judgment on December 7, 1989. The order thereon issued on September 4, 1990. The petition for certiorari was filed on November 5, 1990. Final disposition was not entered until September 4, 1990. The potential for piecemeal review could not have been avoided prior to September 4, 1990.

"The principle is that a post-judgment motion that has the potential for modifying or setting asside the judgment destroys its finality for purposes of appellate review, until the motion is acted upon by the court that rendered the judgment. Thus, it has been held that a motion for a rehearing or a motion to set aside a judgment terminates the running of the time within which review must be sought in the Supreme Court and that the

full time commences to run anew upon entry of the order that disposes of the motion." 12 Moore's Federal Practice, section 607.04 (12).

In Federal Trade Comm. v. Minneapolis-Honeywell Co., 344 U.S. 206, 211 (1952) the Court stated "Only when the lower court changes matters of substance, or resolves a genuine ambiguity in a judgment previously rendered should the period within which an appeal must be taken or petition for certiorari filed begin to run anew." In this case the respondent filed a motion to clarify because of a "genuine ambiguity" and this genuine ambiguity was not resolved until September 4, 1990.

In addition, as Stern, Gressman and Shapiro, Supreme Court Practice 314-315 (6th ed., 1986) state, Burlington Northern Inc. v.

U.S., 131, 138, note 5 (1982) "relied on this passage in Minneapolis-Honeywell in holding that the time to petition for certiorari begins anew when a second court of appeal's decision "resolved a genuine ambiguity in a judgment previously rendered and dealt with a question which was not plainly and properly settled with finality."

Minneapolis-Honeywell was also held inapplicable in Federal Trade Comm. v. Colgate-Palmolive Co., 380 U.S. 374, 378-384 (1965) which held that "at the least the court's second opinion resolved a genuine ambiguity in the first," with the result that the time within which certiorari had to be requested dates from the second judgment.".

In Osterneck v. Ernst & Whinney, 109 S.C. 987, 990-992 (1989) the court said "We

stated in White [v. New Hampshire Department of Employment Security, 455 U.S. at 451, 102 S.Ct. at 1166] that a postjudgment motion will be considered a Rule 59(e) motion where it involves 'reconsideration of matters properly encompassed in a decision on the merits'....Under these precedents, the Court of Appeals was correct to conclude that a postjudgment motion for discretionary prejudgment interest constitutes a motion to alter or amend the judgment under Rule 59(e). First, we have repeatedly stated that prejudgment interest 'is an element of [plaintiff's] complete compensation....Second....a motion for discretionary prejudgment interest does not raise issues wholly collateral to the judgment in the main cause of action'...., nor does it require an inquiry wholly

'separate from the decision on the merits'....Thus, we conclude that a postjudgment motion for discretionary prejudgment interest involves the kind of reconsideration of matters emcompassed within the merits of a judgment to which Rule 59(e) was intended to apply.

"Our conclusion that a postjudgment motion for discretionary prejudgment interest is a Rule 59(e) motion also helps further the important goal of avoiding piecemeal appellate review of judgments."

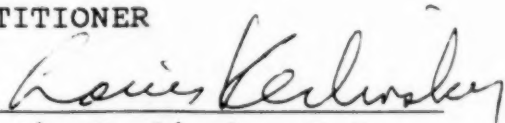
Here the Board's motion to clarify pertained to the amount of interest claimed.

In U.S. v. Ohio Power Co., 353 U.S. 98, 99 (1956) the Court held "We have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the

strict application of our rules". The interests of justice as well as the strict application of the rules establish that this petition for certiorari is timely.

Respectfully submitted.

THE PETITIONER

By 

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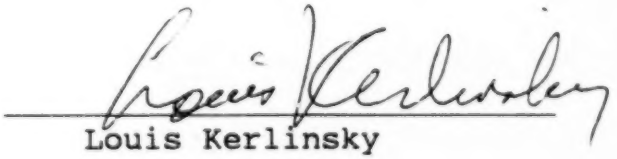
I hereby certify that a copy of the foregoing has been mailed this th day of December, 1990 to Nancy Kaufman, Attorney for the Board of Bar Overseers, 75 Federal Street, Boston, MA 02110.



Louis Kerlinsky